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IN THE

Supreme Court of the United States

October Term 1942

No. 236

UNITED STATES OF AMERICA ON RELATION OF SAMUEL OSTRAGER, and SAMUEL OSTRAGER, in his own behalf,

Petitioners,

vs.

NEW ORLEANS CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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NEW ORLEANS CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Your petitioners, the United States of America *ex rel.* Samuel Ostrager and Samuel Ostrager in his own behalf, respectfully pray that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, entered in the above cause on April 15, 1942, affirming the judgment of the United States District Court for the Eastern District of Louisiana, dismissing plaintiffs' (petitioners') suit.

Opinion Below.

The opinion of the District Court maintaining the defense of double jeopardy, interposed by defendants (respondents) and dismissing said action [R. 81] appears not to have been reported. The opinion of the Circuit Court of Appeals [R. 115] is reported in 127 F. 2d 649.

Jurisdiction.

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on April 15, 1942.. [R. 115.] The jurisdiction of this court is invoked under section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Preliminary Statement.

Petitioner by his complaint sought to recover on behalf of the United States as well as himself double damages and penalties sustained as the result of the admittedly collusive bidding on a contract secured by respondents to perform work on a municipally sponsored PWA project. The respondents had previouslyl been indicted in two counts. [R. 25.] By the first count of the indictment brought under section 88 of the T. 18, U.S. C.A., respondents were charged with a conspiracy to defraud the United States and to violate section 9 of the Emergency Relief Appropriation Act. [R. 26-34.] By the seecond count of the indictment respondents were charged with violating section 9 of the Emergency Relief Appropriation Act of 1935. [R. 34-37.] Count one was dismissed [R. 59], and a plea of *nolo contendere* was entered on count 2 of the indictment.

Respondents by their answer to petitioners' complaint pleaded three defenses. The first defense alleged that the complaint fails to state a claim against defendants upon which relief can be granted. [R. 12.]

The second defense alleged that defendants, by reason of their indictment and conviction under plea of *nolo contendere* were being twice put in jeopardy for the same offence.

The third defense consisted of admissions and denials of certain paragraphs and parts of certain of petitioners' complaint.

Responents, by their counter-claim, sought to recover from petitioner damages for the alleged libel contained in his complaint.

In advance of trial, respondents provoked a hearing and requested the court to pass upon their first and second defense and moved for a separate trial on their counter-claim. [R. 22; 85; 91.] At said hearing the court also heard petitioners' motion to dismiss the counter-claim, to strike respondents' second defense and certain of the allegations contained in the third defense. [R. 19-20.]

Thereafter, the court filed its written opinion [R. 81] and judgment [R. 90] (a) overruling respondents' defense of failure to state a cause of action upon which relief can be granted, (b) maintaining respondents' defense of double jeopardy and dismissing petitioners' suit; (c) dismissing respondents' counter-claim; (d) overruling respondents' motion for a separate trial on their counter-claim, and (e) overruling plaintiff's motion to strike respondents' counter-claim, second defense and certain allegations of the third defense.

Both sides appealed from said judgment and the judgment on both appeals was affirmed. On the appeal taken by petitioners, the judgment was affirmed on the ground that "the complaint failed to state a claim against the defendants upon which relief could be legally granted under the statutes relied upon." [R. 118.]

Question Presented.

The broad question here is whether petitioners' complaint stated a claim against respondents on behalf of the United States for double damages and penalties on account of respondents' fraud, under one or more of the first three clauses of R.S. 5438. The question is therefore presented under each clause as follows:

1. LIABILITY UNDER FIRST CLAUSE OF STATUTE:—Whether in a suit on behalf of the United States for damages and penalties, an admittedly fraudulent contractor's claim approved by a federal officer and paid out of United States (WPA) funds is not actionable under the first clause of R.S., Sec. 5438, as a "claim upon or against the Government of the United States, or any department or officer thereof"?

2. LIABILITY UNDER SECOND CLAUSE.—Whether the making and presentation by a defendant contractor of fraudulent claims and false certificates of non-collusive bidding, used by a municipality to aid it in obtaining payment of a grant to such municipality of United States (PWA) funds for the purpose of paying such contractor's claims, is not actionable as against such contractor under the second clause of R.S., Sec. 5438, which imposes liability upon "every person * * * who * * * makes, uses, or causes to be * * * used, any false * * * claim (or) certificate" for the purpose "of obtaining or aiding to obtain the payment or approval of" a claim against the United States?

3. LIABILITY UNDER THIRD CLAUSE.—Whether the presentation of fraudulent contractors' claims addressed to the municipal sponsor of a PWA project for payment from federal PWA funds in the hands of such sponsor —all in furtherance of a conspiracy to defraud the United States—is not actionable under the third clause of R.S., 5438, which imposes liability upon any person who enters into "any agreement, combination, or conspiracy to defraud the Government of the United States" by obtaining the allowance of "any claim," whether against the United States or against a third party, where the effect is to defraud the United States.

Statutes Involved.

Revised Statutes, Sec. 5438:

> Every person (1) who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or (2) who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or (3) who enters into any agreement, combination, or conspiracy to defraud the Government

of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim * * * shall be imprisoned at hard labor for not less than one or more than five years, or fined not less than one thousand nor more than five thousand dollars.

Revised Statutes, Sec. 3490:

Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall do or commit any of the acts prohibited by any of the provisions of section fifty-four hundred and thirty-eight, Title "CRIMES," shall forfeit and pay to the United States the sum of two thousand dollars, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit.[1]

Revised Statutes, Secs. 3491 and 3493, authorizing *qui tam* proceedings to enforce the liability imposed by R.S., Sec. 3490, are printed in the Appendix.

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[1] Because R.S., Sec. 3490, imposed the liability enforceable in *qui tam* proceedings under R.S., Sec. 3491, only for acts in violation of the prohibitions contained in R.S., Sec. 5438, at the time of the enactment of R.S., Sec. 3490, and its incorporation of R.S., Sec. 5438, in 1874, the conduct and acts giving rise to a cause of action under R.S., Sec. 3490, must be measured by the language of R.S., Sec. 5438, as if originally read at the date of the enactment of R.S., Sec. 3490, and not as later amended. *Olson v. Mellon*, 4 F. Supp. 947, aff'd 71 F. 2d 1021, cert. denied 293 U.S. 615.

While R.S., Sec. 5438, was later amended (see 18 U.S.C. Secs. 80, 83), the scope of R.S., Sec. 3490, which incorporated it in the year 1874 remains intact and unaffected. *Kendall v. United States*, 12 Pet. 524, 625; *In re Heath*, 144 U.S. 92, 93, 94.

Statement.

On February 1, 1940, the petitioner on behalf of the United States, as well as in his own behalf, brought this action in the Eastern District of Louisiana against seventeen (17) defendants to recover the penalties and double damages, provided by R.S. Sec. 3490, resulting from acts in furtherance of a conspiracy to defraud the United States in violation of R.S. 5438.

The complaint charged that the defendants were engaged in the business of general contractors in and about New Orleans, Louisiana, and were members of defendant New Orleans Chapter, Associated General Contractors of America, Inc. [R. 3-4]; that all of said defendants, none of whom were in the military or naval forces of the United States [R. 4] entered into a conspiracy to defraud and otherwise injure the United States [R. 7]; that in pursuance of said conspiracy, the defendants, on January 6, 1937, at a regular meeting of the members of defendant New Orleans Chapter, Associated General Contractors of America, Inc., at New Orleans, Louisiana, adopted a resolution requiring each member to add to the amount of each bid thereafter offered and submitted by him the association fees then in force, regardless of whether such bid was on construction work for federal or state governments or otherwise [R. 7]; that in pursuance of said conspiracy, the defendants, except defendant New Orleans Chapter, Associated General Contractors of America, Inc., and one W. F. Jackson, on April 12, 1937, at New Orleans, entered into an agreement that they would add in excess of $7500.00 to all bids submitted, representing estimating, quantity surveying and chapter fees of all bidders, on the contracts

for the foundation work for the main building of the Charity Hospital at New Orleans, Louisiana, and that the successful bidder would pay such excesses to the defendant New Orleans Chapter, Associated General Contractors of America, Inc., for the use and benefit of and to be distributed to the defendants, including defendant New Orleans Chapter, Associated General Contractors of America, Inc. [R. 7-8]; that the Congress of the United States had theretofore enacted the Emergency Relief Appropriation Act of 1935, Supplemental Appropriation Act Fiscal Year 1936 and the First Deficiency Appropriation Act of 1936, to relieve destitution, provide relief, create increased employment and to provide useful public works [R. 5-6]; that pursuant to such Acts and Resolutions and the orders and rules promulgated under their authority, certain sums of money were appropriated for the purposes declared in the Act [R. 6]; that out of the sums so appropriated, the United States of America, through the Federal Emergency Administration of Public Works (commonly referred to as the Public Works Administration) made a grant of money not to exceed $715,380.00 to the Board of Administrators of the Charity Hospital of Louisiana at New Orleans, to aid in the construction of the foundation of the main building of said hospital, said project being known as Docket Number 4529 R and 4529 D [R. 6]; that for the purpose of letting the contracts for the construction work in connection with said project, the Board of Administrators of the Charity Hospital of Louisiana at New Orleans, advertised and called for bids from persons, including the defendants herein, seeking to obtain construction contracts for the performance of the work called for in the project [R. 6];

that defendants, pursuant to the conspiracy and in furtherance thereof, falsely and fraudulently submitted bids [R. 10]; that the defendants and W. F. Jackson Co. were the only bidders for the construction of the foundaation for the main building of the Charity Hospital of Louisiana at New Orleans [R. 8]; that the bids submitted by defendants and W. F. Jackson Co. (the respective amounts of which bids are specifically alleged in the complaint) included the excess amounts which the defendants had theretofore agreed to add to their bids [R. 8-9]; that defendants, in carrying out the conspiracy, falsely and fraudulently executed and delivered or caused to be executed and delivered certain certificates setting forth that said bidder's proposal is genuine and not sham and collusive or made in the interests of or in behalf of any person, firm or corporation not named therein, and that said bidder had not directly or indirectly induced or solicited any other bidder to submit a sham bid or to refrain from bidding or in any manner sought by collusion to secure for himself an advantage over any other bidder [R. 9-10]; that thereafter defendants received awards and entered into said construction work, submitted false and fraudulent written claims for payment, and falsely and fraudulently received from the United States Government, large sums of money, and that the Government of the United States was cheated and defrauded and sustained damages thereby in the amount of $7,620.00 [R. 10]; that the acts of defendants were in contravention of the laws and statutes of the United States, and particularly Sections 80, 83 and 93, of Title 18 of the United States Code Annotated, Revised Statutes, Section 5438 [R. 4-5].

The respondents interposed an answer containing the defenses enumerated in the preliminary statement hereinbefore set forth.

DECISION OF THE DISTRICT COURT.—The district court in its opinion [R. 81-84] and judgment [R. 90] overruled respondents' contention that petitioners' complaint failed to state a cause of action, but maintained respondents' plea of double jeopardy and dismissed petitioners' complaint on that ground.

DECISION OF THE CIRCUIT COURT OF APPEALS.—The circuit court of appeals deliberately failed to decide the question of double jeopardy stating that:

> "there is a divergence of opinion as to what does and what does not constitute double jeopardy in cases of this kind," * * * and preferring "to rest decision upon the contention that the complaint failed to state a claim against the defendants upon which relief could be legally granted under the statutes relied upon. The statutes involved must be strictly construed, and they permit recovery by an informer only when it is shown that the defendants have presented a 'claim upon or against the Government of the United States, or any department or officer thereof knowing such claim to be false, fictitious, or fraudulent.' 31 U. S.C. Sec. 231.
>
> "Nowhere does the informer's complaint charge or allege that any false or fraudulent claim was made to, upon or against the Government of the United States, or any department or officer thereof. * * *" and further that "The successful bidder had no contract with the United States, and the mere fact that the project was financed in part by a federal grant to a state agency in no wise makes the Government of the United States a party to the contract

for purposes of this suit. * * *." "The Board of Administrators of the Charity Hospital of Louisiana, at New Orleans, were the only parties who promised to pay the contractor, and he could look solely to this source of payment. Where the Board of Administrators secured the funds to pay the contractor is not material here. The claim of the defendants was against the Board, they had no claim against the United States, and since no allegation is made in this complaint that a claim had been or could be made by the defendants against the government, this relator was not entitled to recover under these statutes and the complaint should have been dismissed. *United States ex rel Marcus v. Hess*, 3 Circuit, No. 7841, decided March 23, 1942, reaffirmed March 26, 1942, ... F. 2d ....; Cf. *Mandel v. Cooper Corporation*, 42 F. Supp. 317." [R. 118-119.]

Specifications of Errors to Be Urged.

The Circuit Court of Appeals erred:

1. In holding that plaintiffs' complaint failed to charge or allege that any false or fraudulent claim was made to, upon or against the Government or any department or officer thereof.

2. In holding that a right of recovery was not established under the first clause of R.S., Sec. 5438, which makes liable "every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent."

3. In holding that the right of recovery was limited to the first clause of R.S., Sec. 5438.

4. In failing to hold that a right of recovery was established under the second clause of R.S., Sec. 5438, which makes liable "every person * * * who, for the purpose of obtaining or aiding to obtain the payment or approval of (any claim upon or against the Government of the United States) makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry."

5. In failing to hold that a right of recovery was established under the third clause of R.S., Sec. 5438, which makes liable "every person * * * who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim."

6. In affirming the judgment of the district court.

Reasons for Granting Writ.

The circuit court of appeals completely overlooked the fact that the complaint directly and specifically alleges that a false claim was knowingly asserted upon or against the Government. The complaint, in paragraph 15 [R. 10], among other things, alleges that,

> "* * * that all of the aforesaid defendants did falsely and fraudulently submit bids * * * did falsely and fraudulently receive awards and enter into said construction contract in furtherance of said conspiracy, *did submit false and fraudulent written*

claims for payment thereof, did falsely and fraudulently receive from the United States Government large sums of money, and did make or cause to be made false and fraudulent statements or representations in regard to said bids and their claims thereon. and did make or cause to be made or *used false and fradulent certificate or certificates knowing the same to contain false and fraudulent or fictitious statements or entries for the purpose and with the intent of cheating and defrauding the Government of the United States,* and the Government of the United States was cheated and defrauded and sustained damages thereby in the amount of $7,620."

The district court of appeal is therefore in error in stating in its opinion that "nowhere does the informer's complaint charge or allege that any false or fraudulent claim was made upon or against the Government of the United States or any department or officer thereof." The language italicized in the above quotation from petitioners' complaint utilizes almost the identical terminology which the circuit court stated should have been alleged. It is important in this connection to remember that no trial on the merits was ever had in this case and that the district court's holding that "there is no merit in the contention that this action should be dismissed for failure to state a claim upon which relief can be granted" [R. 34] was ruling on a demurrer, and that the circuit court of appeals in reviewing the judgment of the lower court insofar as it decreed that the complaint did state a claim upon which relief could be granted, was reviewing a judgment entered upon the overruling of a demurrer. The principle that a demurrer admits the allegations of the complaint for the purpose of testing its sufficiency,

is too fundamental to require the citation of authority. The principle was as applicable and pertinent upon review of the judgment by the circuit court of appeals as it was upon the ruling by the district court in the first instance. A court in passing upon a demurrer may not concern itself with whether or not the complainant can, at a trial upon the merits, prove the allegations of his complaint, but must accept as true all of the allegations properly pleaded therein.

The circuit court of appeals, in holding the statute to be too narrow to encompass the admitted fraud and injury in the common situation here presented, has severely limited and in large degree emasculated a statute addressed to the cure of a persistent and recurring evil at a time when opportunity and occasion for its violation is increasing. The fact that this is a *qui tam* suit is irrelevant since the rights of the United States suing in its own name under the same statute, R.S., Sec. 3490, could ascend to no greater dignity. The decision, therefore, vitiates the only existing Congressional enactment adequate to make the United States whole on account of frauds depriving it of money or property.

Revised Statute, Sec. 5438, standing alone is merely a criminal statute. But R.S., Sec. 3490, incorporates it and creates in the United States a right to recover double the amount of damages for pecuniary or property loss suffered by reason of fraud in violation of R.S., Sec. 5438, together with a civil penalty of $2,000 for each

such violation. Originally adopted in 1863 when frauds against the Government were prevalent in connection with Civil War contracts, one of its objectives obviously was to reimburse the Government for the heavy expense of investigatio as well as for the loss directly resulting from the fraud. *Cf. Stockwell v. United States*, 13 Wall. 531, 547, 551; *Helevring v. Mitchell*, 303 U. S. 391, 401. No other federal statute thus adequately protects the United States by permitting recovery of double damages. Hence, the decision of the circuit courts of appeals ignores Congressional policy, deprives the United States of a right of recovery sufficient to include the expense of investigation and litigation, abolishes a civil penalty, and nullifies the very purpose of the statute.

But the circuit court of appeals ignored the second and third clauses of the statute altogether, and treated the statute as though it consisted solely of the first clause, saying [R. 118]:

> "The statute involved must be strictly construed and then permit recovery by an informer only when it is shown that defendants have presented a claim upon or against the Government of the United States or any department or officer thereof knowing such claim to be false, fictitious, or fraudulent,"

By narrow and erroneous construction of this language of the first clause it held that no acts in violation of that clause had been alleged. In thus narrowly construing the first clause, and in thus entirely disregarding the second and third clauses, the court below has defeated the plain intention of Congress.

I.

The Narrow Construction of the First Clause of R.S., Sec. 5438 Is Not Warranted by the Terms of the Statute and Is in Conflict With Decisions of the Circuit Courts of Appeals for Other Circuits.

That the claim of the contractor in each instance was a claim against the United States, was alleged in the complaint, as hereinbefore shown by the quotation therefrom. It was alleged (a) that all of the defendants did falsely and fraudulently submit bids; (b) did falsely and fraudulently receive awards and entered into the construction contract; (c) did submit false and fraudulent written claims for payment thereof; (d) did falsely and fraudulently receive from the United States Government large sums of money; (e) did make or cause to be made false and fraudulent statements or representations in regard to said bids and the claims thereon; (f) did make or use or cause to be made or used false and fraudulent certificate or certificates knowing the same to contain false and fraudulent or fictitious statements or entries for the purpose and with the intent of cheating and defrauding the Government of the United States; (g) that the Government of the United States was cheated and defrauded. [R. 10.]

These allegations must be deemed to be true. Thus the situation falls precisely within the plain language of the first clause of R.S., Sec. 5438, imposing liability on "every person who * * * presents or causes to be presented, for payment or approval, to or by any person or officer in the civil * * * service of the United States any claim upon or against the Government of the United

States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent."

The moneys representing that portion of the Federal grant paid out of the Treasury to the local municipalities were earmarked as moneys of the United States, and the account was supervised in every detail by federal officers. (Emergency Relief Appropriation Act of 1935.) In *Madden v. United States*, 80 F. 2d 672 (C. C. A. 1), cert. denied 297 U. S. 710, the court said (p. 676):

> "Defendant contends that there was a fatal variance between the proof and the indictment. His argument is that funds granted by the Federal Emergency Relief Administration to the Emergency Finance Board, a state agency, became state funds and thereafter no title thereto existed in any federal agency and when the Emergency Finance Board transferred part of its funds to the City of Boston for payment of Boston Public Library employees; title to such funds passed to the City of Boston, and thereafter the power of disposition of such funds was in the City of Boston and no Federal agency had any power over them. This contention is not sound. All projects carried on with money derived from the federal government had to be approved by the Federal Administrator. Any diversion of such funds from the project to which they were assigned was a diversion of government money. As hereinbefore stated, all funds allotted by the federal government for the relief of unemployment even though disbursed by state agencies *were earmarked as federal funds, and if diverted from the use for which they were granted it constituted a fraud upon the government.*" (Italics ours.)

In *Langer v. United States*, 76 F. 2d 817 (C. C. A. 8), the court said (p. 823):

> "Appellants next contend that the indictment charges no offense because if the money were money of the United States prior to its being turned over to North Dakota officials, it then ceased to be such, and appellants could not obstruct nor defeat the administration of the federal statutes because they were administering funds belonging to the state, and were not federal officials. In this connection it is urged that it was the intent to pass full and complete title to the money when the Reconstruction Finance Corporation, or the Administrator under the Federal Emergency Relief Act of 1933, loaned it to the state, or otherwise devoted it to the use of the state. Whether the money is granted or loaned by the Reconstruction Finance Corporation or the Administrator under the Federal Relief Act of 1933, *it is money of the Reconstruction Finance Corporation.*" (Italics ours.)

See to the same effect *United States v. Harding*, 65 App. D. C. 161, 81 F. 2d 563, 568.

The holding of the court below presents a conflict with these decisions. Moreover, whatever may have been the arrangement in those decisions, in the present case the complaint clearly alleges that the funds were moneys of and belonged to the United States.

The Circuit Court of Appeals departed from the record in arriving at its decision herein. This is apparent from its language [R. 119] that

> "Indeed, it is without dispute that the contract which was entered into and signed after the submis-

sion of bids was by and between the defendants and the Board of Administrators of the Charity Hospital of Louisiana at New Orleans, a state board or agency. The successful bidder had no contract with the United States, and the mere fact that the project was financed in part by a Federal grant to a state agency in nowise makes the Government of the United States a party to the contract for purposes of this suit. A claim against the United States could not be made by the contractor if he had no contract with the Government and had no right to demand money from it. The Board of Administrators of the Charity Hospital of Louisiana at New Orleans were the only parties who promised to pay the contractor and he could look solely to this source for payment. Where the Board of Administrators secured the funds to pay the contractor is not material here. The claim of the defendants was against the board, they had no claim against the United States, and since no allegation is made in this complaint that a claim had been or could be made by the defendants against the Government, this relator is not entitled to recover under these statutes and the complaint should have been dismissed."

It is obvious from a consideration of the complaint that the matters assumed and considered by the Circuit Court of Appeals were matters *de hors* the record.

Disregarding the fact that the court's conclusion is based upon extraneous matters, it nevertheless is untenable for the reason that it is not necessary that a claim be formally

addressed to th[illegible]. In addition to the fact, as pointed out in *Madden v. United States, supra,* that any diversion of funds from a project to which they were assigned by the Federal Government was a diversion of government money. A claim is just as clearly a claim against the United States when submitted for approval to an officer of the United States so long as it involves a claim against or in derogation of, the pecuniary or property right of the United States. See *United States v. Mercur Corporation,* 83 F. 2d 178, Cert. denied 299 U. S. 576. The first clause of the statute here involved, moreover, in terms includes the presentation of such claims "for payment or approval, to or by any person or officer in the civil * * * service of the United States."

Finally, in its construction of the first clause of the statute, to which it arbitrarily limited its attention, the court below ignored further important and controlling language. Even if it be assumed that these were technically claims against the municipalities rather than against the United States, still the presentation of the contractors' claims to the municipalities, in the words of the first cause of the statute, "causes to be presented" in turn a claim by the municipalities "against the Government of the United States" which the contractors knew "to be false or fraudulent." The facts supporting the cause of action under this portion of the first clause are more fully set forth below in connection with the next point.

II.

The Circuit Court of Appeals Ignored the Second Clause of R.S., Sec. 5438, and Thus Both Nullified the Clearly Expressed Intention of Congress and Deprived the United States of Substantial Rights Under the Statute.

The provisions of R.S., Sec. 5438, evince an intention on the part of Congress to protect the United States against pecuniary loss by fraud, no matter how indirect the cause. The first clause relates to the presentation of a "claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious or fraudulent." The second clause relates to anyone who, for the purpose of *"aiding to obtain"* the payment or approval of a claim against the United States or any department or officer thereof, "makes, uses or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit or deposition, knowing the same to contain any fraudulent or fictitious statement or entry."

Thus, plainly in this second clause Congress intended to reach not the direct presentation of a fraudulent claim against the United States covered by the first clause, but rather a separate and distinct offense: The making or causing to be used of a false claim, certificate, or affidavit—whether or not in itself it be a "claim against the United States"—if such claim, certificate, or affidavit be "for the purpose of obtaining or *aiding to obtain* the payment or approval of a claim against the United States" by another—in this case the municipality. *United States v. Coggin*, 3 Fed. 492, 495; see *United States v. Strobach*, 48 Fed. 902, 909.

Acts by defendants in violation of the second clause of R.S., Sec. 5438, were clearly alleged. The allegations that false "claims" and false "certificates" were made by defendants and caused by them to be used, bring the action within the provisions of the second clause "for the purpose of obtaining or aiding to obtain the payment or approval of" claims upon the Government of the United States. The fact that such claims were made by or through the medium of a municipality, does not alter or affect the ultimate fact. The municipalities, of course, were but the innocent conduits of the fraud of the defendants.

The complaint alleged that the defendants' contracts were based on fraudulent bidding and that included in the bids was a certificate by the bidder that

> "this Proposal is genuine and not sham or collusive, or made in the interest or in behalf of any person, firm or corporation not herein named, and that the undersigned has not directly or indirectly, induced or solicited any other bidder to submit a sham bid, or any other person, firm, or corporation to refrain from bidding and that the undersigned has not in any manner sought by collusion to secure for himself an advantage over any other bidder." [R. 9-10.]

It is clear from the complaint that the defendant contractors made the certificates and that the certificates so made in the language of the statute were "caused to be used" by the defendants against the United States. The complaint specifically alleges that the defendants "did make or use or cause to be made or used false and

fraudulent certificate or certificates knowing the same to contain false and fraudulent or fictitious statements or entries for the purpose and with the intent of cheating and defrauding the Government of the United States, and that the Government of the United States was cheated and defrauded and sustained damages thereby * * *." [R. 10.]

It is axiomatic that the conspirator defendants are presumed to intend the ordinary, natural, probable, or necessary consequence of their voluntary, intentional, and deliberate acts. *United States v. Patten*, 226 U. S. 525, 543; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 243. Accordingly, the allegations of the complaint clearly brought the defendants within the language of the second clause of R. S., Sec. 5438, imposing liability upon anyone "who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim (against the United States) makes, uses or causes to be made or used, any bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition knowing the same to contain any fraudulent or fictitious statement or entry."

The Circuit Court of Appeals, however, failed even to consider whether a cause of action had been alleged under this plainly pertinent language of the second clause of R.S., Sec. 5438. In so doing, the court violated the well-established rule that effect must be given to all parts of a statute. *D. Ginsburg & Sons v. Popkin*, 285 U. S. 204, 208; *McDonald v. Thompson*, 305 U. S. 263, 266.

III.

The Court Below Ignored the Third Clause of R.S., Sec. 5438, Which Imposes Civil Liability Upon Any Person Who Enters Into "Any Agreement, Combination, or Conspiracy to Defraud the Government of the United States" and Pursuant Thereto Presents "Any False or Fraudulent Claim" Whether Against the United States or Against a Third Party So Long as the Effect, as Here, Is to Defraud the United States.

The third clause of R.S., Sec. 5438, evinces still further Congressional intention to assure that the statute would embrace every possible type of fraud in connection with claims paid in whole or part from Federal funds. It was obviously intended to apply where claims in effectuation of the conspiracy are made, whether directly against the United States or against third parties, if the result is to defraud the United States. For, unlike, and in sharp contrast with, the language of the first and second clauses, the word "claim" in the third clause is not limited to those "against the United States." The third clause by its terms embraces "any false or faudulent claim." Since Congress elected to frame three separate clauses, the difference in phraseology in the third clause cannot be disregarded.

Here the conspiracy in the form of collusive bidding, is shown by the complaint and admitted by the demurrer contained in the answer interposed by defendants. The third clause of R.S., Sec. 5438, is directed to any form of joint action "to defraud the Government of the United States" and completely encompasses the joint action of the defendants in defrauding the United States, as specifically alleged in the complaint.

This tangible and pecuniary fraud upon the United States consummated by claims—whether regarded as falling within the first, second, or third clauses of R.S., Sec. 5438—is plainly within the scope of the statute. It is a travesty to assume, as does the court below, that Congress intended to protect against claims presented to federal departments at Washington but not against claims presented to a federal officer or the sponsor of a PWA project at New Orleans, where a fraud involving federal funds results in either instance.

Importance of the Question.

The question here is whether the plain language of the statute is to be judicially limited and in large part nullified. No other legislation confers the right to recover penalties and double damages for frauds in connection with claims against the United States. The pressing need for such a remedy for this specific evil has been recently recognized in this Court. See *United States v. Cooper Corp.*, 312 U. S. 600, 614. Judicial recognition of the plain intent of Congress and the preservation of the remedies and safeguards created by it require that the decision of the court below be brought here for review.

Wherefore it is respectfully submitted that this petition for certiorari should be granted.

Dated July 14, 1942.

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WILLIAM KATZ,
Attorneys for Petitioners.

APPENDIX.

REVISED STATUTES.

Sec. 3491. The several district courts of the United States * * * within whose jurisdictional limits the person doing or committing such act shall be found, shall, wheresoever such act may have been done, or committed, have full power and jurisdiction to hear, try, and determine such suit. Such suit may be brought and carried on by any person, as well for himself as for the United States; the same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the district attorney, first filed in the case, setting forth their reasons for such consent.

Sec. 3493. The person bringing said suit and prosecuting it to final judgment shall be entitled to receive one-half the amount of such forfeiture, as well as one-half the amount of the damages he shall recover and collect; and the other half thereof shall belong to and be paid over to the United States; and such person shall be entitle to receive to his own use all costs the court may award against the defendant, to be allowed and taxed according to any provision of law or rule of court in force, or that shall be in force in suits between private parties in said court: *Provided*, That such person shall be liable for all costs incurred by himself in the case, and shall have no claim therefor on the United States.